

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION

SEP. 18 2006

JOHN F. CORCORAN, CLERK  
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UNITED STATES OF AMERICA

CASE NO. 5:06CR00043

v.

**REPORT AND  
RECOMMENDATION**

ANDREW JUNG NA

By: Hon. James G. Welsh  
U.S. States Magistrate Judge

In accordance with the provisions of Title 28 U.S.C. § 636(b)(3) and upon the defendant's consent, this case was referred to the undersigned to conduct an initial appearance, waiver of indictment, and plea hearing. The proceedings were recorded by a court reporter (*See* Rule 11(g)), and the defendant was provided with a Korean language interpreter.

**DEFENDANT'S RESPONSES TO RULE 7 INQUIRY**

The United States proposed to file a criminal information charging the defendant with knowingly engaging in conduct, on or about June 15, 2001, involving the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase plants, to wit: five pounds of *Panax quinquefolius* L, commonly referred to as "ginseng," with a market value in excess of \$350.00, and knowingly transporting, selling, receiving, acquiring, or purchasing said plants in interstate commerce, knowing that said plants were taken, possessed, transported, or sold in violation of, or in an unlawful manner under any law or regulation of the Commonwealth of Virginia, all in violation of Title 16, United States Code, Sections 3372(a)(2)(B) and 3373(d)(1)(B).

On September 21, 2006 a waiver of indictment proceeding was conducted before the undersigned and the defendant waived indictment. At this hearing, the defendant came in his own proper person and with his counsel, Sandi S. Rhee. The United States was represented by Catherine C. Pisaturo, Special Assistant United States Attorney. After the defendant was placed under oath and addressed personally (*see* Rule 11(b)(1)), he stated that he understood his obligation to testify truthfully in all respects under penalty of perjury and that he could be prosecuted for perjury or false statement in the event that he failed to do so. *See* Rule 11(b)(1)(A).

He gave his full legal name as Andrew Jung Na. He stated his current age to be 37 years, and that he had completed the twelfth grade in school. He testified that his ability to read, write and understand the English language was limited; however, he could fully understand and participate in the proceedings with the interpreter's assistance. He stated that he had no medical condition, either physical or mental, which might interfere with his ability fully to understand and participate in the proceeding, and he stated that he was using no medication or drugs which might impair his ability to understand and participate in the proceeding. The defendant further testified that he had discussed the charge with his attorney, that the proposed Information had been fully read and translated for him, that he was fully satisfied with the services of his attorney, and that he had received and fully understood the charge against him in the Information.

The charge set forth in the proposed Information was nevertheless fully explained to the defendant, and he was informed that the charge was a felony. *See* Rule 11(b)(1)(G). The defendant again stated that he understood the charge and that he understood the charge was a felony.

The defendant was next informed that he had a constitutional right to be charged by a grand jury indictment, that a grand jury might not find probable cause to believe that he committed the alleged offense, that a grand jury might or might not return an indictment against him, and that a waiver of indictment by him would mean that the case would proceed as though he had been regularly indicted by a grand jury. The defendant testified that he had discussed the matter of waiving his right to indictment with his attorney, that he fully understood his right to indictment by grand jury, that no threats or promises had been made to induce him to waive indictment, and that it was his desire to waive his right to grand jury indictment. *See* Rule 7(b).

With the agreement of his attorney that the defendant's waiver of indictment was his free and voluntary act, the defendant formally waived indictment and signed the waiver of indictment form in open court. The Information was then formally filed, and undersigned noted for the record that the defendant's waiver of indictment was knowingly and voluntarily made and that its acceptance would be recommended.

#### **DEFENDANT'S RESPONSES TO RULE 11 INQUIRY**

After the defendant's written waiver of indictment was executed, a further plea hearing was conducted by the undersigned on the same date. As previously reported herein, the defendant had been placed under oath and had given testimony confirming his identity, his competency, his receipt of a copy of the Information, his understanding of the charge, his previous full discussion of the charges with his attorney, and his satisfaction with the representation and advice of his attorney. He reiterated that he was not then under the influence of any alcohol, medicine or drugs of any sort. In response to further questioning, the defendant stated that his mind was clear and that he understood

that he was in court for the purpose of entering a guilty plea. Upon inquiry by the undersigned, the defendant's attorney represented that she had no reservations about her client's competency to enter a plea of guilty.

At the plea hearing, the defendant re-confirmed that the Information had been fully translated and read to him, that he had discussed it in detail with his attorney, and that he knew it charged him with a felony. In response to questions from the undersigned, the defendant stated that he had been given adequate time to discuss with his attorney both the charge and any possible defenses he might have to the charge. He testified that his desire for the court to accept his plea of guilty to the charge in the Information was made only after consulting with his attorney.

Upon inquiry, the defendant expressly testified that he understood that he had the right to have a United States district judge conduct the Rule 11 proceeding, and upon further inquiry he expressly consented to this proceeding before a United States magistrate judge.

After the defendant confirmed that he was fully satisfied with the services and that it was his intention to enter a plea of guilty to the charge set forth in the Information, The attorney for the government then stated that defendant's plea was to be made pursuant to a written PLEA AGREEMENT AND SENTENCING STIPULATIONS make pursuant to Rule 11(c)(1)(C). She then stated the government's understanding of the plea agreement in some detail, including a summary of each the sixteen numbered paragraphs in the agreement. After which, both the defendant and his attorney represented to the court that their understanding of the plea agreement was precisely the same as that set forth by the government's attorney. In addition, the defendant's attorney confirmed that she

has reviewed each of the terms of the plea agreement with her client and that she was satisfied that he understood each of its terms. The defendant was then shown the original of the plea agreement; and he affirmed it to be his signature on the document. He further testified that no one had made any other, different or additional promise or assurance of any kind in a effort to induce him to enter a plea of guilty in this case and that no one had attempted in any way to force him to plead guilty in this case. *See* Rule 11(b)(2).

The pleas agreement was then filed and made a part of the record, and the undersigned noted for the record that the written Plea Agreement constituted the best statement of its terms, and as such it “speaks for itself.”

In response to questions by the undersigned, the defendant acknowledged he understood that he was proposing to pleas guilty to having illegally purchased and/or sold ginseng having a value in excess of three hundred fifty dollars, a Class D felony. He testified that he understood the maximum sentence for this offense was five years imprisonment, a fine of \$250,000.00, and a period of supervised release (§ 1). *See* Rule 11(b)(1)(H). In addition, he stated that he understood that he will be required to pay a mandatory special assessment of \$100.00 (§ 6). *See* Rule 11(b)(1)(L). He stated that he understood his plea, if accepted would result in his being adjudicated guilty of a felony offense which may deprive him of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any kind of firearm.

The defendant confirmed that he had discussed with his attorney how the U. S. Sentencing Guidelines might apply to his case, that he knew the Guidelines were no longer mandatory but may

be applied by the court in an advisory fashion to determine a reasonable sentence, that he understood it was within the court's discretion not to apply the advise of the Guidelines and to impose a sentence either higher or lower than called-for by the Guidelines, so long as the sentence was not greater than the statutory maximum for the offense, and that he understood that the District Court would not be able to determine the applicable Guidelines range for advisory purposes until after his presentence report had been prepared and the government and he had each had an opportunity to challenge the facts reported by the probation officer. *See* Rule 11(b)(1)(M).

The defendant was informed, and he expressly acknowledged, that in determining his sentence the court would consider the following factors: the nature and circumstances of the offense; his history and characteristics, and the need for the sentence imposed by the court to reflect the seriousness of the offense, the need for it to promote respect for the law, the need for it to provide just punishment, the need for it to afford adequate deterrence, the need for it to provide for public protection, the need for any sentence to provide the defendant with any needed educational or vocational training, medical care or other correctional treatment in the most efficient manner; the kinds of available sentences, the pertinent guidelines and policy statements; the need to avoid unwanted sentence disparities, and the court's authority to order restitution. *See* Rules 11(b)(1)(K) and 11(b)(1)(M).

He stated that he understood, pursuant to the terms of the plea agreement, he was waiving both his rights to appeal guideline sentencing issues (§ 8) and to attack collaterally his plea and sentence (§ 9). *See* Rule 11(b)(1)(N).

Each of his procedural rights surrendered on a plea of guilty was explained, including his right to plead not guilty to any offense charged against him and his right to persist in any not guilty plea (*see* Rule 11(b)(1)(B)), his attendant right to a trial by jury (*see* Rule 11(b)(1)(C)), and his right to the assistance of counsel at trial and at every other stage of the proceeding (*see* Rule 11(b)(1)(D)). He stated that he understood by pleading guilty he was waiving his right to the presumption of innocence and the obligation of the government to prove his guilt beyond a reasonable doubt, his right to see and hear all witnesses and to have them cross-examined in his defense, his right to decline to testify unless he voluntarily elected to do so in his own defense, his right to the issuance of subpoenas or compulsory process to compel the attendance of witnesses to testify in his defense, and his right to a unanimous guilty verdict. *See* Rule 11(b)(1)(E). The defendant testified that he understood his right to plead not guilty and the attendant rights that he would waive by pleading guilty. *See* Rule 11(b)(1)(F).

By entering a plea of guilty, the defendant stated, he understood that he was admitting all of the elements of a formal criminal charge, and he stated that he was pleading guilty because he was in fact guilty of the offense charged in the Information.

For the purpose of establishing a factual basis for the defendant's plea of guilty, counsel for the government then summarized the contents of the parties detailed written Factual Proffer (*pp.* 15-20 attached to the Plea Agreement). *See* Rule 11(b)(3). Both the defendant and his counsel confirmed the accuracy of the facts relevant to the offense set forth in the Factual's Proffer.

After confirming that he had heard and understood all parts of the proceeding, the defendant stated that it remained his desire to plead guilty. After consultation with counsel, the defendant waived a reading of the Information, entered a plea of GUILTY to Count One alleging his violation of Title 16, United States Code, Sections 3372(a)(2)(B) and 3373(d)(1)(B), and executed the requisite written guilty plea form.

After his entry of the plea of guilty, after establishment of an independent basis for the plea and after he was informed that the undersigned would recommend acceptance of his plea, the defendant reiterated her full satisfaction with the advice, assistance and services of her attorney.

With the concurrence of the government's attorney, the defendant was released on an unsecured bond in the amount of \$ 7,500.00.

### **GOVERNMENT'S EVIDENCE**

The government's evidence is set forth in detail in the FACTUAL PROFFER which consists of pages 15 through 20 of the PLEA AGREEMENT AND SENTENCING STIPULATIONS, and it is incorporated herein and made a part hereof by reference.

### **FINDINGS OF FACT**

Based on the evidence, representations of counsel, and defendant's sworn testimony presented as part of the hearing, the undersigned submits the following formal findings of fact , conclusions and recommendations:

1. The defendant is fully competent and capable waiving his right to grand jury presentment;

2. The defendant, in open court and after being advised of the nature of the charge and of his rights, waived prosecution by indictment;
3. The defendant is fully competent and capable of entering an informed plea;
4. The defendant is fully aware of the nature of the charge and the consequences of his plea;
5. The defendant is fully informed, and he understands, the applicable enumerated items set forth in Rule 11(b)(1)(A)–(N);
6. Before entering his plea, the defendant and the government reached a detailed plea agreement and sentencing stipulation pursuant to Rule 11(c)(1)(C) which was reduced to writing and signed by the defendant;
7. Defendant's entry into a plea agreement, his waiver of indictment and his tender of a plea of guilty were made with the advice and assistance of retained counsel;
8. The plea agreement complies with the requirements of Rule 11(c)(1)(C);
9. The defendant knowingly and voluntarily entered a plea of guilty to Count One of the Information;
10. The defendant's plea of guilty is fully voluntary and did not result from force, threats, or promises other than those contained in the written plea agreement; and
11. The evidence presents an independent basis in fact containing each essential element of the offense to which the defendant is pleading guilty.

## **RECOMMENDED DISPOSITION**

Based on the above findings of fact, the undersigned RECOMMENDS that the court accept defendant's plea of guilty to Count One of the Information, that he be adjudged guilty of that offense, and that a sentencing hearing be scheduled for December 4, 2006 at 10:00 a.m.

## **NOTICE TO PARTIES**


Notice is hereby given to the provisions of 28 U.S.C. § 636(b)(1)(c): Within ten (10) days after being served with a copy of this Report and Recommendation, any party may serve

and file written objections to such proposed findings and recommendations as provided by the rules of court. The presiding District Judge shall make a *de novo* determination of those portions of the report or specified findings or recommendations to which objection is made. The presiding District Judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the undersigned. The presiding District Judge may also receive further evidence or recommit the matter to the undersigned with instructions.

Failure to file timely written objections to these proposed findings and recommendations within ten (10) days could waive appellate review. At the conclusion of the ten-day period, the Clerk is directed to transmit the record in this matter to the presiding United States District Judge.

The clerk is directed to transmit copy of this Report and Recommendation to all counsel of record.

DATED: 18<sup>th</sup> day of September 2006

  
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U.S. Magistrate Judge